IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO. 103 OF 2006
WITH
CIVIL APPLICATION NO. 126 OF 2006

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

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Mr. Birendra Saraf i/b Mr. S.M. Khaire for the appellants.
Mr. R.A. Thorat with Mr. P.J. Thorat for respondent NO.1.
Mrs. Geeta Joglekar for B.M.C.

CORAM : A. M. KHANWILKAR, J.

DATE : FEBRUARY 16, 2006

P.C.

. Heard.

2. Admit.

3. Counsel appearing for the respondents waive service As Short question is raised, appeal is heard forthwith by consent.

4. After hearing Counsel for the rival parties for some time, the core issue revolves around the stand taken by the respondent No.1 which found favour with the lower Court. The respondents would contend that the undertaking as filed before this Court dated 21st July 2004, was sufficient to secure the claim of the plaintiffs even if they were to succeed in the suit. However, on careful examination of the reliefs claimed in the plaint, it is not possible to accept this submission. In prayer clause (b) of the plaint, the plaintiffs pray in the following terms:

> "It be declared that the Defendant No.1 have no right of whatsoever nature to carry out any such construction on the Plot of land reserved as recreation ground as reflected in the Plan annexed with the Plaint at Exh."D" and more particularly in respect of the property situate at Sachidham, Goregaon-Mulund link Road, Malad (East), Mumbai-400 097 in any manner whatsoever."

Obviously, if the plaintiffs were to

succeed in prayer clause (b) above, the respondents will be obliged to put back the area shown as recreation ground in the plan annexed to the plaint Exh. "D", to its original position. In other words, the development activities on the said portion of the plot will have to be made subject to the out come of the suit unless the respondent No.1 were to successfully challenge the covenant in the conveyance which entitles the plaintiffs to assert the right in respect of the said portion of the plot shown as reserved for recreation ground, in the plan annexed to the plaint at Exh."D".

5. Having regard to this situation, it was suggested to Mr. Thorat appearing for the respondent No.1 that respondent No.1 may consider whether the respondent No.1 was willing to make statement that all developmental activities on the disputed portion shown as recreation ground will continue, to be made subject

to the out come of the suit.

6. Mr. Thorat on instruction of representative of respondent No.1, who is present in the Court, fairly accepts that the respondent No.1 will have to file cross-claim in the pending suit before the lower Court amongst others, to challenge the covenant in the conveyance dated 1st July, 1990, whereby the plaintiffs purptotedly assert right in respect of the land shown as reserved for recreation ground in the plan appended to the plaint at Exh."D".

7. Mr. Thorat accepts that the respondent No.1 will abide by the final decision of the trial Court in the suit, in the event the plaintiffs were to succeed in getting the relief in terms of prayer clause (b). It is on this assurance which is accepted, the present appeal is disposed of leaving all questions on the aforesaid point in issue

open for consideration for the trial Court on its own merit in accordance with law.

8. At this stage, counsel for the appellants submits that the respondent No.1 intends to create third party interest in the developed property on the disputed portion of the land. If so, the respondent No.1 shall be obliged to disclose to the prospective purchasers about the pendency of the present proceedings and the nature of the order passed including that the respondent No.1 has given assurance before this Court today, through their Counsel that they will abide by the final decision in the pending suit before the trial Court, and no equities will be claimed, in the event of appellants/plaintiffs were to succeed. In my opinion, it is imperative for the respondent No.1 to disclose to the prospective purchasers about the pendency of the present proceeding and the nature

of the assurance given before this Court by the respondent No.1 so that no equities can be claimed even by the prospective purchasers or by any person/ persons claiming through the respondent No.1 at the later stage of the proceedings.

9. Indeed Mr. Thorat was opposed to make any such observation in the present order on the argument that such relief has been rejected by the trial Court, while dismissing the notice of motion. This objection overlooks that the trial Court proceeded on the assumption that the respondent No.1 has complied with the undertaking given before this Court and nothing more was required to be done. That assumption, as has been observed in earlier part of this order, is inappropriate specially having regard to the wide relief claimed by the plaintiffs in terms of prayer clause (b) which is reproduced in its entirety.

10. Appeal is disposed of on the above terms.

11. In view of this order, Civil Application is also disposed of.

(A.M. KHANWILKAR, J.]